

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
BRIEF**

ORIGINAL

77-7187

United States Court of Appeals
For the Second Circuit

DOCKET NOS. 77-7187; 77-7271; 77-7273

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, in behalf of
its membership affected and in behalf of Classes involved
herein, GARY MICHAEL, MICHAEL FAGAN and MARTIN F.
RANDOLPH, JR., individually and as Class Representatives,
and in behalf of all other parties similarly situated and
circumstanced,

Plaintiffs,

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F.
RANDOLPH, JR., GARY MICHAEL and MICHAEL FAGAN,

Plaintiffs-Appellants,

I. WALTON BADER,

Appellant,

-against-

TELEPROMPTER CORPORATION, TOUCHE ROSS & COMPANY,
HERBERT SCHLAFELY, WILLIAM BRESNAN, MARVYN
CARTON, "JOHN DOE" and "RICHARD ROE", the names
"JOHN DOE" and "RICHARD ROE", being fictitious, the
parties intended being those persons, firms, corporations and
associations involved in the unlawful acts involved herein,

Defendants,

TOUCHE ROSS & CO.,

Defendant-Appellee

HARRY LEWIS, et al.,

Plaintiffs,

-against-

TELEPROMPTER CORP., et al.,

Defendants.

Consolidated Appeal

APPELLANTS' SUPPLEMENTAL BRIEF

BADER and BADER
Attorneys for Appellants
65 Court Street
White Plains, N.Y. 10601

TABLE OF CONTENTS

	<u>PAGE(S)</u>
STATEMENT OF THE REASONS FOR THIS BRIEF	1
ARGUMENT: THE ORDER OF THE DISTRICT COURT REQUIRING FURTHER ANSWERS TO INTERROGATORIES WAS COMPLIED WITH, BUT, EVEN ASSUMING THAT IT WAS NOT, THE COURT USED AN IMPROPER BASIS OF ASSESSING ATTORNEYS' FEES.	2 - 4
CONCLUSION: THE DETERMINATION OF THE DISTRICT COURT SHOULD BE IN ALL RESPECTS REVERSED.	4

TABLE OF CASES

	<u>PAGE(S)</u>
<u>Browning Debenture Holders' Committee, etc. vs. Dasa Corporation, et al., (2 Cir. 1977)</u> (Decided August 11th, 1977)	1, 2, 4
<u>Cabales vs. United States, (DC SDNY 1970)</u> 51 FRD 498,499	1, 4
<u>City of Detroit vs. Grinnell Corp., et al.,</u> Docket No. 76-7252 (2 Cir.) (Decided August 30th, 1977)	1
<u>Cuban Cigar Brands vs. Upmann International, Inc.</u> (DC SDNY, Docket No. 77 Civil 345)	3
<u>Israel Aircraft Industries vs. Standard Precision,</u> Dockets No. 76-7591, et. seq.	2
<u>Jones vs. Goldtsein, 40 FRD 271</u>	4
<u>Korn vs. Franchard Corporation, 456 Fed (2nd)</u> 1206 (2 Cir. 1972)	1
<u>Torre vs. Grasso, 11 Misc. (2nd) 275 (1958)</u>	3
<u>W. T. Grant Company vs. Haines, 531 Fed (2nd)</u> 671 (2 Cir. 1976)	1

STATUTES CITED

Rule 61 FRCP	3
Rule 37 FRCP	2, 3
New York General Obligations Law, Section 5-1502 H	3

APPELLANTS' SUPPLEMENTAL BRIEF

STATEMENT OF THE REASONS FOR THIS BRIEF

On August 11th, 1977, one day prior to the date that this Court required Appellants to file their brief and Joint Appendix, (which date the Court refused to extend), an important decision involving a line of cases recently decided by this Court was rendered. The decision involved was Browning Debenture Holders' Committee, etc. vs. Dasa Corporation, et. al., Dockets 77-7013, 77-7014 and 77-7074. On August 30th, 1977, this Court also decided City of Detroit vs. Grinnell Corp. et. al., Docket No. 76-7252.

The Appellants, understandably, could not include these decisions in their brief to this Court, nor to comment thereupon. These Decisions, taken in connection with Cabales vs. United States (DC SDNY 1970), 51 FRD 498,499; W. T. Grant vs. Haines, 531 Fed(2nd) 671 (2 Cir. 1976) and Korn vs. Franchard Corporation, 456 Fed(2nd) 1206 (2 Cir. 1972) clearly shows that the present determination appealed from cannot be sustained.

The District Judge made two significant errors. Firstly, he erroneously determined that the Order requiring further answers to interrogatories was not complied with. Secondly, after assuming such non-compliance, he utilized an improper basis for assessing attorneys' fees.

THE ORDER OF THE DISTRICT COURT REQUIRING
FURTHER ANSWERS TO INTERROGATORIES WAS
COMPLIED WITH, BUT, EVEN ASSUMING THAT IT
WAS NOT, THE COURT USED AN IMPROPER BASIS
OF ASSESSING ATTORNEYS' FEES

Browning vs. Dasa, supra, points out that attorneys' fees cannot be assessed against a party (or his attorney) unless there is a statutory authorization therefor. On page 18 of the opinion of the Court, it was held as follows:

" * * * Under the American Rule, every party to a case bears its own attorneys' fees and a court will not ordinarily assess such fees except to the extent that their assessment is specifically authorized by Congress. * * * "

Applying the Browning rule to this case, therefore, the Court's determination could only be sustained under the specific provisions of FRCP 37.

Applying Rule 37 to the facts in this case, we find that Rule 37(a) is inapplicable since this section involves only proceedings before issuance of an Order compelling discovery. Rule 37(c) is inapplicable relating to failure to admit.

Rule 37(d) is inapplicable unless there is a complete failure to comply with discovery (Israel Aircraft Industries vs. Standard Precision, Dockets No. 76-7591, et. seq.).

Rule 37(b) is therefore the only Rule upon which the District Court could rely. However, even technically, there was compliance with the Court's Order in time. Since the attorney for IIPL could sign interrogatory

answers (see page 30 of Appellants' main brief), the copies served on September 5th, 1974 were in all respects proper. Since RANDOLPH concededly signed answers prior to September 3rd, 1974 and FAGAN concededly signed the answers prior to September 5th, 1974, these answers were in all respects proper even if they had not been physically in the possession of the Appellants' attorney on September 5th, 1974. In addition, of course, Appellants' attorney has filed a Power of Attorney to himself from IIPL, RANDOLPH and FAGAN giving general authority for action in the case of "Claims and Litigation". Under New York Law, such authority gives the holder of the power the right to verify pleadings. (See General Obligations Law 5-1502 H, Torre vs. Grasso, 11 Misc. (2d) 275 (1958).

Indeed, in this Circuit, the use of Powers of Attorney to support interrogatory answers is well established. See, for example, Cuban Cigar Brands vs. Upmann International, Inc. (DC SDNY, Docket 77 Civil 345).

In addition, compliance with an Order must be also considered within the framework of Rule 61. Thus, even assuming that the copies served on September 5th, 1974 were procedurally defective in some way, such defect would be excusable where no prejudice occurred to the adverse party.

Appellee's attorney admitted that no prejudice was involved in this case repeatedly. (See JA 215, 644, 780, 781, 820, 821 and 830).

Indeed, it is also a practice in this Court, that where actual signed

answers are not available within a period set for compliance with an Order, a party will send unsigned answers and then follow them up with signed answers. See, for example, Cabales vs. United States, (DC SDNY 1971), 51 FRD 498, 499; Jones vs. Goldstein, 41 FRD 271.

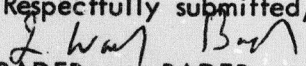
Assuming, however, that the Order was not complied with, and that non-compliance was not excusable, then the District Court erred in failing to hold an evidentiary hearing with respect to attorneys' fees. The measure of these fees is not the amount expended by a party but, as held by this Court in Browning, *supra*, page 20, as follows:

" * * * The proper measure, however, should be the cost of services and research reasonably required to obtain a dismissal of the claim * * * not necessarily the amount actually incurred. * * * "

A hearing is thus necessary (involving prior depositions of the parties involved) to obtain such correct amount and not in the manner utilized by the District Court.

CONCLUSION

THE DETERMINATION OF THE DISTRICT COURT SHOULD BE IN ALL RESPECTS REVERSED.

Respectfully submitted,

BADER and BADER
Attorneys for Appellants
65 Court Street
White Plains, NY 10601
(914) 682-0072

BADER

STATE OF NEW YORK)
: ss.
COUNTY OF RICHMOND)

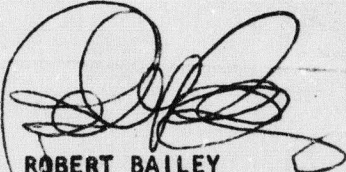
ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 8 day of Sept. 1977 deponent served the within Sup. Brief upon

Rosenman, Colin, Freund,
Lewis & Cohen, Esqs.

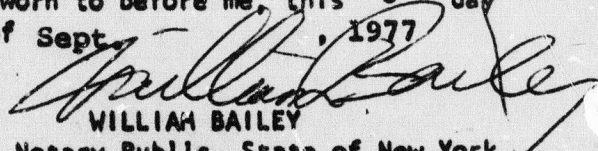
attorney(s) for
Respondents

In this action, at
575 Madison Aveny NYC 10022

the address(es) designated by said attorney(s) for that purpose by depositing
3 copies of same enclosed in a postpaid properly addressed wrapper, in an
official depository under the exclusive care and custody of the United States
post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 8 day
of Sept. , 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

